Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

In re HARRY RONALD RICE,
PETITIONER,

V.

UNITED STATES OF AMERICA,
RESPONDENT.

ON A PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA

PETITION FOR A WRIT OF MANDAMUS

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23 pp

QUESTION PRESENTED

1. DOES THE DISTRICT COURT AND/OR APPELLATE COURT HAVE A DUTY TO INQUIRE INTO AN " EXCUSEABLE NEGLECT" ISSUE REGARDING THE LATE FILING OF A NOTICE OF APPEAL PURSUANT TO FED. APP. PROC. RULE 4(b), OR CAN BOTH COURTS SIMPLY IGNORE THE ISSUE AND THEREBY TERMINATE AN APPEAL AND THUS VIOLATE PETITIONER' S DUE PROCESS RIGHTS?

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ON A PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA

Petitioner, Harry Ronald Rice, respectfully petitions this Court to issue a writ of mamdamus regarding the January 27, 1997 decision of the United States Court of Appeals for the Fourth Circuit. The appeals court refused jurisdiction of an appeal due to the late filing of the notice of appeal. However, the issue of "excuseable neglect" as raised by Petitioner pursuant to Fed. App. Proc. Rule 4(b) was never addressed by the appeals court or district court. Petitioner seeks this writ in order to be heard on the issue of excuseable neglect.

OPINIONS BELOW:

The opinion of the United States Court of Appeals for the Fourth Circuit is United States v. Rice, No. 96-6633 and a copy is provided in the appendix attached hereto as Exhibit A.

JURISDICTION:

This Petition for a Writ of Mandamus is requested pursuant to Rule 20 of the Rules of the Supreme Court as authorized by 28 U.S.C. Sec. 1651(a).

STATUTES INVOLVED

Petitioner has a right to appeal his criminal conviction and sentence pursuant to the due process clause of the Fifth Amendment ot the United States Constitution.

The applicability of the "excuseable neglect" provision of Federal Appellate Procedure Rule 4(b) as applied to this case should have been considered. Accordingly, this Petition is filed resulting from all lower courts refusal to address the issue of the existance of "excuseable neglect".

STATEMENT OF THE CASE

Petitioner filed his 28 U.S.C. Sec. 2255 motion in February, 1994 requesting his sentence and conviction of conspiracy to violate 18 U.S.C. Sec. 1956(a)(1)(B)(i) be VACATED. The basis of this Sec. 2255 motion was due to the government's failure to establish federal subject matter jurisdiction over the conviction and sentence. Any violation of Sec. 1956, including conspiracy to violate, requires the government to charge in the indictment, prove at trial, and properly instruct the jury that an affect on interstate or foreign commerce must exist, sine qua non, to have a violation, see 18 U.S.C. 1956(c)(4)(A).

In the case sub judice, as raised in Petitioner's Sec. 2255 motion, the government failed to:

1. charge in the indictment that an affect on interstate or foreign commerce had occurred;
2. no evidence was proffered at trial that even a minimal affect on interstate of foreign commerce were caused by actions described in the indictment;
3. the jury was never instructed on any elements of 18 U.S.C. Sec. 1956(a)(1)(B)(i), specifically an affect on interstate or foreign commerce; and,
4. the words "financial transaction" which in any way affect interestate or foreign commerce, the jurisdictional element, is dehors from the record.

A review of the indictment and trial record will indicate the aforementioned facts are undisputed.

The Court of Appeals for the Fourth Circuit ruled in United States v. Peay, 972 F. 2d 71, 74 (1991), that proof of some affect on interstate or foreign commerce is required to establish federal jurisdiction under 18 U.S.C. Section 1956. This holding regarding the interstate commerce/jurisdictional issue is consistent with other holdings by the Supreme Court in Strione v. United States, 316 U.S. 212, 216-218 (1960); and, United States v. Lopez, 115 S. Ct. 1624, 131 L Ed 2d 626 (1995).

On November 17, 1994, District Court Judge Robert D. Potter DENIED Petitioner's Section 2255 motion, calling the aforementioned issues "frivilous legal issues". As of November 17, 1994, Petitioner had been transferred three (3) times in his state of incarceration within ninety (90) days of this ORDER.

Accordingly, Petitioner did not learn of the district court's ORDER of November 17, 1994 until April of 1996, and then only thru a related civil case. In April 1996, a request for a copy of said ORDER was made to the Clerk of Court, receiving the ORDER on April 6, 1996. Petitioner then filed Notice of Appeal within ten (10) days, and concurrently filed a Motion for Leave of Court To File Notice of Appeal. In essence, this was a pleading for "reasonable neglect" due to the circumstances described in that motion. The district court never addressed this motion. Subsequently, Petitioner was given a docket number and a filing deadline for his brief by the Clerk of the Court of Appeals for the Fourth Circuit. Petitioner's brief was filed May 13, 1996.

On January 21, 1997, in an unpublished opinion, the Fourth Circuit Court of Appeals refused to accept jurisdiction of the case because of the untimely filing of the Notice of Appeal. Petitioner filed a Petition for Rehearing on February 4, 1997 requesting the appellate court to REMAND the case to the district court for a determination of the existance of the "excuseable neglect" clause of Federal App. Proc. Rule 4(b). The Fourth Circuit Court of Appeals DENIED the request for rehearing and issued a Mandate on the decision of January 21, 1997 on April 17, 1997*. Therefore, in the instant case no court has ever addressed the issue of whether "excuseable neglect" exists in the late filing of Notice of Appeal pursuant to Rule 4(b) of the Rules of App. Proc..

*** Mandates are issued 7 days after denial of Petition for Rehearing.**

REASONS FOR GRANTING THE WRIT

Petitioner has a right to an appeal of a district court's ORDER. The district court and the appellate court both had a duty to examine the facts regarding the "excuseable neglect" issue when raised in both courts.

"Present federal law has made an appeal from a district court's judgment of conviction in a criminal case what is, in effect, a matter of right." Coppege v. U.S., 389 U.S. 438, 441, 82 S. Ct. 917, 919, 8 L. Ed 21 (1961).

Petitioner's situation is simular to the circumstances found in Crumpton v. U.S., 496 F. Supp. 774 (Los Angles Ca. 1980). Crumpton was proceeding pro se, was at all reveiant times in federal custody, was being transferred from one federal institution to another, did not learn that the motion had been denied until nearly two months after its denial through no fault of his own part, and attempted to obtain an extension of time in which to file his notice of appeal. The court found his late filing of Notice of Appeal to be made under circumstances which justify a finding of "excuseable neglect".

It is the opportunity to establish excuseable neglect which courts should extend to appellants who have tried, but technically failed, to file within the filing requirements for filing a Notice of Appeal. See, U.S. v. Stoarz, 547 F. 2d 108 (9th Cir. 1976), cert. denied 434 U.S. 851 (1977); and, Johnson v. U.S., 405 F 2d 1072 (D.C. Cir. 1968).

The excuseable neglect clause has been applied to permit late filing in cases of ignorance or neglect of the accused himself, U.S. v. Brown, 263 F. Supp. 777 (E.D.N.C. 1966); in cases of ignorance or neglect of counsel, U.S. v. Lewis, 522 F. 2d 2367 (5th Cir. 1975); U.S. v. Ferrer, 613 F. 2d 1188 (1st Cir. 1980); and, in interference by external circumstances, U.S. v. Ford, 627 F. 2d 807 (7th Cir. 1980), cert. denied 449 U.S. 923 (1980), (prison authorities may have delayed mailing of prisoner's appeal).

The detailed set of facts and circumstances of why excuseable neglect is present in this case is not the purpose of this motion. The details of this situation should be presented at the district court level. The purpose of this motion is to establish Petitioner's right to be heard on the excuseable neglect issue. Otherwise, district court judges may be able to prevent any appeal by a pro se petitioner while they are incarcerated, if for any reason prison authorities fail to get any ORDER denying any motion that may be appealed in the hands of the incarcerated individual in a timely manner.

This particular district court judge, for reasons known only to him, refused to address the excuseable neglect position previoiusly raised by Petitioner. This same judge refused to VACATE the sentence and conviction regarding a multi object conspiracy with a general verdict of guilty, sentencing Petitioner under the most severe object offense in which no jury instructions were given on any of the elements of that object offense, 18 U.S.C. Sec. 1956(a)(1)(B)(I). Intentionally, this

district court judge did not follow the established case law of his own circuit, U.S. v. Winfield, 997 F. 2d 1076, 1080-81 (4th Cir. 1993), and rights established by the Fifth Amendment of the United States Constitution.

Also, this district court judge and the Fourth Circuit Court of Appeals both had a sua sponte duty to dismiss this sentence and conviction for the failure of the government to establish federal subject matter jurisdiction, [i.e. no nexus to interstate or foreign commerce regarding the object offense, 18 U.S.C. Sec. 1956(a)(1)(B)(i)]. For the sua sponte duty see, U.S. v. Brown, 995 F. 2d 1493, 1504 (10th Cir. 1993); U.S. v. Meacham, 626 F. 2d 503, 509 (5th Cir. 1980); and, inter alia, U.S. v. Sharp, 608 F 2d 950, 960 (3rd Cir. 1979).

Although all judges involved, in this case, are quick to determine a lack of jurisdiction for a late filing of notice of appeal, without any consideration of excuseable neglect; they have all been blind to the total lack of federal subject matter jurisdiction of the conviction and sentence under 18 U.S.C. Sec. 1956(a)(1)(B)(i).

Petitioner submits that if an inquiry were made into the facts and circumstances to ascertain how the applicable case law has been applied, one would find a district court judge acting intentionally and knowingly to deprive this Petitioner of his constitutional rights, exercising no discretion or individual judgment; acting no longer as a judge, but as a minister of his own prejudices.

The district court judge simply chose not to address the excuseable neglect issue or even advise this pro se Petitioner of that available relief in this case. Accordingly, he has failed to perform a ministerial act, and/or he has failed to do an obligation to act within a specified range of required duties, Save the Dunes Council v. Alexander, 584 F. 2d 158.

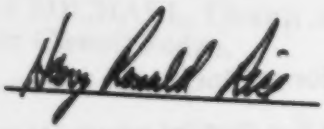
Petitioner is unaware of any other court in which relief may be sought. This is not a mere mistake of law or erroneous factual finding, but a clear cut abuse of discretion and usurpation of power by this district court judge. (See, Homewood Professional Care Center, Ltd. v. Hooker, 764 F 2d 1242.)

Petitioner is not requesting to be released from incarceration, he has already served his sentence. Petitioner is not requesting that this COURT VACATE his sentence and conviction, rather that extraordinary circumstances exist revelant to Rule 4(B) of the Rules of App. Proc. which should allow the Court of Appeals for the Fourth Circuit to accept jurisdiction over Petitioner's previously filed appeal.

CONCLUSION:

WHEREFORE, Petitioner prays this HONORABLE COURT in the interest of justice to REMAND this case to the district court for a determination of the applicability regarding the "excuseable neglect" provision of Rules of App. Proc. 4(b) in this case. If found to be applicable, the Fourth Circuit Court of Appeals would then have jurisdiction to consider Petitioner's appeal.

Petitioner respectfully submits under penalty of perjury, that the foregoing representations are true and accurate to the best of his knowledge.



Harry Ronald Rice,
Petitioner

IN THE SUPREME COURT.

OF THE

UNITED STATES OF AMERICA

CASE #96-6633 (Fourth Circuit Docket #)

APPENDIX

APPENDIX A: Opinion of the Court of Appeals for the Fourth Circuit, U. S. v. Rice, 96-6633

APPENDIX B: Petitioner Motion for Leave of Court to File Notice of Appeal, filed with the district court on April 15, 1996.

APPENDIX C: Fed. App. Proc. Rule 4(b), and 18 U.S.C. Sec. 1956(c)(4).

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 96-6633

UNITED STATES OF AMERICA,

Plaintiff - Appellee

versus

HARRY RONALD RICE,

Defendant - Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. Robert D. Potter, Senior District Judge. (CR-90-114-C-P, CA-94-52-3-P)

Submitted: January 9, 1997 Decided: January 21, 1997

Before HALL and MICHAEL, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

Harry Ronald Rice, Appellant Pro Se. James Michael Sullivan, Assistant United States Attorney, Gretchen C. F. Shappert, Assistant United States Attorney, Charlotte, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

EXHIBIT A

PER CURIAM:

Appellant filed an untimely notice of appeal. We dismiss for lack of jurisdiction. The time peirods for filing notices of appeal are governed by Fed R. App. P. 4. These periods are mandatory and jurisdictional. " Browder v. Director, Dep't of of Corrections, 434 U.S. 257, 264 (1978) (quoting United States v. Robinson, 361 U.S. 220, 229 (1960)). Parties to civil actions have 60 days within to file in the district court notice of appeal from judgments or final orders. Fed. R. App. P.4(a)(1). The only exceptions to the appeal period are when the district court extends the time to appeal under Fed. R. App. P. 4(a)(5) or reopens the appeal period under Fed R. App. P. 4 (a)(6).

The district court entered its order on November 17, 1994; Appellant's notice of appeal was filed on April 15, 1996. Appellant's failure to note a timely appeal or obtain either an extension or a reopening of the appeal period leaves this court without jurisdiction to consider the merits of Appellant's appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

EXHIBIT A

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Filed April 17, 1997

No. 96-6633
CR-90-114-C-P
CA-94-52-3-P

MANDATE

The judgment of this Court dated 1/21/97 takes effect today.

Patricia S. Connor
Clerk

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT FOR THE

WESTERN DISTRICT OF NORTH CAROLINA

CHARLOTTE DIVISION

3:95CV12-MU; 3:94CV52-P

HARRY RONALD RICIE, PLAINTIFF/PETITIONER

VS.

UNITED STATES OF AMERICA, DEFENDANT/ RESPONDENT

MOTION FOR LEAVE OF COURT TO FILE NOTICE OF APPEAL ON THE DENIAL OF THE 28 USC SECTION 2255 MOTION FBY ORDER OF THE COURT NOVEMBER 17, 1994

COMES NOW, Harry Ronald Rice, Plaintiff/Petitioner requesting Leave Of Court pursuant to the ORDER issued April 1, 1996 enjoining Plaintiff/Petitioner from filing any pleadings in the Western District of North Carolina without first obtaining Leave of Court.

EXHIBIT B

FACTS:

1. Petitioner filed his Objecftions to the DENIAL of his U.S.C. Sec. 2255 Motion on March 21, 1994.

2. Petitioner was transferred from the Federal Prison Camp at Seymour Johnson, A.F.B. to the satellite jail of Mecklenburg County on or about August 17, 1994.

3 In late August of early September, petitioner received his two boxes of legal files from the Federal Prison Camp, Seymour Johnson, A.F.B. These boxes were mailed to the forwarding address left with the Bureau of Prison Officials, the petitioner's parent's address. (See exhibit A attached)

4. Petitioner was released from custody of Bureau of Prisons on January 6, 1995. Within minutes Petitioner filed his civil complaint, #3:95CV-12MU. The court is aware that a request was made in this civil complaint to combine it with the then pending (as to Petitioner's knowledge) 28 U.S.C. Section 2255 Motion.

5. Petitioner received the Court's ORDER of April 1, 1996 on April 3, 1996. Petitioner was convinced the Court was in error regarding the Denial of his second 28 U.S.C. Sec. 2255 Motion. Petitioner only had knowledge of the Magistrates's Memorandum and Recommendation's Denial of this Motion. EXHIBIT B

6. Petitioner called the clerk of Court's office on April 5, 1996 and spoke to, Cynthia Huntley. This Clerk's assistant was requested to check on the last action filed by the government on case # 3:94CV-52P (petitioner's 2255 motion). Ms. Huntley stated an ORDER had been filed on November 17, 1994. Petitioner requested a copy be sent to him, receiving it on April 8, 1996.

7. Judge Potter was apparently unaware that on the date he issued the aforementioned ORDER, a petition for Rehearing was pending at the Supreme Court, (See Exhibit B attached).

8. Petitioner declares under penalty of perjury he was unaware prior to April 5, 1996 that a decision on his Section 2255 Motion had been issued. Petitioner also declares that he had never seen said ORDER on this Motion priot to April 8, 1996.

WHEREFORE, Petitioner PRAYS this Court to GRANT LEAVE to File Notice of Appeal and accompanying Docketing Statement with this Court and the United States Court of Appeals for the Fourth Circuit.

Submitted April 11, 1996, under penalty of perjury.

Harry Ronald Rice, Petitioner/Plaintiff

EXHIBIT B

Title 28: Rule 4(b) Federal Appellate Procedure Rules

(b) Appeals in criminal cases. - In a criminal case the notice of appeal by a defendant shall be filed in the district court within 10 days after entry of (i) the judgment or order appealed from or (ii) a notice of appeal by the Government. A notice of appeal filed after the announcement of a decision, sentence or order but before entry of the judgment or order shall be treated as filed after such entry and on the day thereof. If a timely motion in arrest of judgment or for a new trial on any ground other than newly discovered evidence has been made, an appeal from a judgment of conviction may be taken within 10 days after the entry of an order denying the motion. A motion for a new trial based on the newly discovered evidence will similiary extend the time for appeal from a judgment of conviction if the motion is made before or within 10 days after entry of the judgment. When an appeal by the government is authorized by statute, the notice of appeal shall be filed in the district court within 30 days after the entry of (i) the judgment or order appealed from or (ii) a notice of appeal by any defendant. A judgment or order is entered within the meaning of this subdivision when it is entered in the criminal docket. Upon a showing of excuseable neglect the district

EXHIBIT C

court may, before or after the time has expired, with or without motion and notice, extend the time for filing a notice of appeal for a peirod not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision.

Title 18 U.S.C. Sec. 1956(c)(4)

(4) the term "financial transaction" means a transaction involving the movement of funds by wire or other means or involving one or more monetary instruments, which in any way or degree affects interstate or foreign commerce, or a transaction involving the use of a financial institution which is engaged in, or the activities affect, interstate or foreign commerce in any way or degree.

EXHIBIT C